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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1956

## No. 766

FIELD ENTERPRISES, INC., a corporation,
*Petitioner,*

vs.

AUGUSTE PARKER
and
CHECKER TAXI COMPANY, INC., a corporation,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## NO.

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FIELD ENTERPRISES, INC., a corporation,
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vs.

AUGUSTE PARKER
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CHECKER TAXI COMPANY, INC., a corporation,
*Respondents.*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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*To The Honorable Justices Of The Supreme Court Of The United States:*

Petitioner, Field Enterprises, Inc., defendant-appellant in the proceedings below, petitions this Court for a Writ of Certiorari directed to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court entered November 19, 1956,

affirming an order of the United States District Court for the Northern District of Illinois, Eastern Division, entered January 9, 1956, denying a motion of defendant, Field Enterprises, Inc., to vacate and set aside a judgment theretofore on October 10, 1955, entered by said Court on the verdict of the jury assessing damages against petitioner, Field Enterprises, Inc., and respondent, Checker Taxi Company, Inc., and in favor of respondent, Auguste Parker, in the sum of Ten Thousand Dollars ($10,000.00).

## OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 238 F. 2d 241, under the caption *"Parker* v. *Checker Taxi Company, Inc."* and is also set forth in the appendix to this petition. (App. p. 2a) The United States District Court for the Northern District of Illinois, Eastern Division rendered no opinion.

## GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals sought to be reviewed, was entered November 19, 1956 (App. p. 1a). A petition for rehearing was denied by said Court of Appeals on December 26, 1956 (App. p. 9a).

This Court has jurisdiction to review the judgment in question by the issuance of a Writ of Certiorari under 28 U.S.C. §1254 (1). This petition is filed within ninety days after the entry of the aforesaid judgment of the Court of Appeals as required by 28 U.S.C. §2101(c).

## THE QUESTION PRESENTED FOR REVIEW

The question presented for review is whether a United States District Court, its attention having been called after judgment by a petition under Rule 60(b)(3) of the Rules of Civil Procedure for United States District Courts to the existence of a secret agreement between the plaintiff and one of two co-defendants in a personal injury case to obtain assistance and cooperation in the trial in exchange for a promise not to proceed against that defendant for satisfaction of any judgment which might be obtained, should require an answer and hear evidence on the charge, or may properly summarily overrule and deny such petition. Also involved are the subsidiary questions whether, such an agreement appearing, a showing of prejudice to the complaining defendant is necessary, and if necessary, whether such prejudice sufficiently appears in the record.

## RULE OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS INVOLVED

This cause involves an interpretation of Rule 60 (b)(3) of the Rules of Civil Procedure for the United States District Courts which provides:

> "On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
>
> "* * * (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."

## STATEMENT OF THE CASE

This cause arose out of an action brought by respondent, Auguste Parker, a citizen of the State of Illinois, against Checker Taxi Company, Inc., a Delaware corporation and Field Enterprises, Inc., a Delaware corporation for personal injuries sustained in a collision between a Chicago Sun-Times news truck owned by petitioner, Field Enterprises, Inc., and a Checker taxi cab, in which Parker was riding as a passenger, at the intersection of Burling and Dickens Streets in Chicago, Illinois, on September 19, 1953. Jurisdiction in the District Court was based on diversity of citizenship and the requisite amount in controversy under 28 U.S.C. 1332 (Tr. 8). In this action respondent, Checker Taxi Company, Inc., filed a counterclaim against petitioner for damages allegedly sustained by its taxi cab (Tr. 12), and petitioner filed a cross claim against respondent, Checker Taxi Company, Inc., for damages allegedly sustained by its news truck (Tr. 16).

On the trial before District Judge John P. Barnes and a jury, petitioner's driver testified that he was driving between 20 and 25 miles per hour at the time of the occurrence (Tr. 49), 25 miles per hour being the speed limit (Tr. 53); and that the cab was traveling at about the same speed (Tr. 53). The taxi cab driver, with respect to whom plaintiff's attorney asked and obtained leave to examine "as an adverse witness, being the agent of the defendant, Checker Taxi Company" (Tr. 41), testified that he was going 20 miles an hour

(Tr. 42) and that the Sun-Times' truck was going "50, 55 miles per hour."

On October 4, 1955, the jury returned five separate verdicts: the first, a verdict finding both defendants guilty and assessing plaintiff's damages at $10,000.00; the second and third finding each defendant individually guilty, and assessing plaintiff's damages at $5,000 against the respective defendants individually, and the fourth and fifth finding each of the defendants not guilty on the counterclaim and cross claim (Tr. 62).

On October 10, 1955, a formal judgment was entered against both defendants in the sum of $10,000.00, the District Judge having disregarded, as surplusage, the individual verdicts for $5,000.00 against each defendant (Tr. 63-64).

Motions of defendants for new trials were denied December 5, 1955. On January 4, 1956 (no notice of appeal from the judgment having been filed in the interim) petitioner presented its petition alleging that plaintiff, Auguste Parker, and defendant, Checker Taxi Company, Inc., at or about the time suit was filed, entered into a secret agreement whereby Checker Taxi Company, Inc., would be named a party defendant, but plaintiff would not execute any judgment against it if one were obtained in the trial of the suit, in exchange for defendant, Checker Taxi Company Inc.'s promise to make its file available to plaintiff's counsel in the prosecution of the suit (Tr. 67). This agreement was alleged to have remained in effect at the time of the trial (Tr. 67).

The petition further alleged that during the trial, the agreement was not communicated by either plaintiff or

Checker to the Court, the jury, or to petitioner, Field Enterprises, Inc., that defendant, Checker Taxi Company, Inc., made available to the plaintiff, its file for use in the prosecution of the cause and permitted its employee (the taxi driver) to be called as an adverse witness on behalf of plaintiff, that it was the intention of plaintiff and defendant, Checker, to present a moot question to the court and jury as to the liability of Checker; and that said parties conspired to give the court and jury the impression that plaintiff was prosecuting an action against two defendants, when in fact, the only question that was being presented, because of the agreement, was the liability of Field Enterprises, Inc. (Tr. 68). It was charged that petitioner was thereby deprived of a fair consideration of its liability and that the agreement was disclosed to petitioner after the denial of motions for new trial on December 5, 1955, when petitioner was told it would have to pay the full judgment (Tr. 69).

The petition was verified solely by Donald John Tufts, the attorney for petitioner who tried the case in the United States District Court, the form of verification being that "the things and matters set out in this petition are true according to his information and belief (Tr. 70)." The court denied the petition on January 9, 1956 (Tr. 71), no answer being required of respondents and no opportunity to present evidence as to the truth of the matters set forth in the petition having been afforded.

On appeal, the Court of Appeals affirmed this order. (App. p. 1a).

## ARGUMENT

We submit that the Court of Appeals has decided an important question of Federal Law relating to procedure which has not been, but should be, settled by this Court and has also so far sanctioned a departure from the accepted and usual course of judicial proceedings by the United States District Courts as to call for an exercise of this Court's power of supervision.

We believe that by its opinion and action in this case, the Court of Appeals has judicially condoned an insidious practice which has been creeping into multi-party personal injury actions in those jurisdictions, such as Illinois,* where contribution between joint tort feasors is not permitted.

In the instant case, petitioner, by clear and unequivocal allegations, verified by a member of the bar of the District Court, charged the existence of a secret agreement between plaintiff, Parker, and defendant, Checker, to go through the motions of a sham or pretense of a trial so far as the liability of defendant, Checker, was concerned. In pursuance of this understanding, plaintiff's attorney was enabled to call Checker's driver as an adverse witness on the most material issue in the case. Plaintiff was given the benefit of defendant's trial preparation. We respectfully submit that this practice cannot be countenanced in the Federal Courts, and honestly believe that the courts below had their

* **Selz v. Unna**, 73 U.S. 327, 6 Wall. 327, 18 L. Ed. 799; **Blair v. Cleveland Twist Drill Co.**, 197 F. 2d 842, 844, United States Court of Appeals, Seventh Circuit).

eyes focused on the end result of the litigation, and overlooked the serious danger of degrading the moral tone of Federal proceedings lurking in acquiescence in this type of misconduct.

With the broadening of the base of liability in all fields, and the drastic curtailment upon common law defenses which has taken place in the negligence field in recent years, the temptation to indulge in some form of trickery to obtain an unfair advantage in litigation of this sort, all too frequently presents itself. The rules governing trial practice, like the rules of evidence, are designed to get before the court and jury those items of evidence which are probably true and credible, and, on the other hand, to exclude from consideration material that is suspect of or replete with the possibilities of perjury. The agreement charged at bar abounds with vicious possibilities.

The question actually presented to the Court of Appeals below was not whether in view of all of the facts in evidence, Field Enterprises, Inc., should go scot-free and the injured plaintiff should take nothing for his pains. The question was whether the District Court correctly summarily overruled the petition or whether charges sufficient to require answer and inquiry had been brought to the attention of that Court.

In *Klapprott* v. *United States,* 335 U.S. 601, 608, 628, 629, which is the only decision of this Court dealing with Rule 60(b), counsel have found, the two principal opinions appear to recognize the intended liberalizing effect of Rule 60(b) as Amended and to sanction a broad interpretation of the rule to meet the requirements of justice. That the intent of the rule was to bring about a more liberal attitude in the exercise of

the trial court's sound discretion whether relief should be granted was also indicated and applied by the United States Court of Appeals for the District of Columbia in *Bridoux* v. *Eastern Airlines, Inc.*, 214 F. 2d 207, 210, and by the United States Court of Appeals for the Third Circuit in *Tozer* v. *Charles A. Krause Milling Co.*, 189 F. 2d 242, 245.

At bar, we submit, the District Court and the Court of Appeals applied "a standard of strictness rather than one of liberality in concluding that justice did not require"* that inquiry be had.

Neither the District Court nor the Court of Appeals said that agreements between apparently adversary litigants to force one of two co-defendants to shoulder the entire responsibility for an occurrence are sanctioned by the law. Yet the necessary effect of both rulings is to sanction this practice. We believe the mere existence of such an agreement to be sufficient *per se* to vitiate the proceedings to which it pertains. We believe it to have been an abuse of discretion not to inquire into the truth of such charges, seriously made. We do not believe the reasons assigned by the Court of Appeals for refusing to disturb the denial of the petition are valid.

**Discussion of the Court of Appeals' Opinion.**

The Court of Appeals, we submit, erroneously applied the concept of burden of proof for fraud in this case (App. p. 6a, 233 F. 2d at p. 243, 244). Since relief was denied on the face of the petition, the question was one of pleading, not of proof. Fraud, in the broad sense of fraud upon the court was charged, the facts

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* Tozer v. Charles A. Krause Milling Co., 189 F. 2d 242, 245.

constituting that fraud *i.e.* the agreement, its concealment and its consummation, were specifically alleged and the remaining allegations, those dealing with the intentions of Parker and Checker (Pet. Par. 6, 12—Tr. 68, 69) were properly alleged generally under Rule 9(b)* of the Rules of Civil Procedure for United States District Courts. Moreover, the gravamen of the petition is more properly characterized as "misconduct of an adverse party" within the meaning of Rule 60(b)(3), than classical "fraud." There is no requirement that "misconduct" shall be pleaded with particularity.

The Court of Appeals also apparently depreciates the charges because made by a member of the bar "on information and belief." (App. p. 6a, 238 F. 2d at p. 244). In so doing, the Court apparently overlooked the want of any requirement for verification of motions in Rule 60(b). A motion pursuant to Rule 60(b), need not—as a motion for summary judgment under Rule 56(e) must—be supported by an evidentiary affidavit. Moreover, can a Court presume that a member of its own bar regards his obligations so lightly as to treat cavalierly, a serious charge such as that made in the instant petition?

Next, the Court of Appeals is concerned with the absence of supporting evidence (App. p. 6a, 238 F. 2d at p. 244). How could there be proofs when no answer to the petition was required and the petition was summarily overruled?

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* (b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake, shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Finally, the Court notes an apparent absence of a showing of prejudice. (App. p. 7a, 238 F. 2d at p. 244). As we have stated, we cannot believe that any such test should be applied. Even so, on the record here, prejudice indisputably appears. In view of the sharp conflict in the testimony between the drivers of the vehicles, how can it be said that on the issue of liability, petitioner was not prejudiced by the advantage to plaintiff which accrued from the calling of the cab driver as an adverse witness? (Tr. 41). In view of the separate, individual verdicts of $5,000.00 against each defendant (Tr. 62) is it not apparent that the actual result of the litigation, by reason of the secret agreement not to proceed against Checker, is other than that intended by the jury?

Once an agreement had been made not to enforce any judgment against Checker, Checker should not have been a party to the suit. No one can now say what course the evidence, instructions and arguments would have taken had the case been prosecuted against petitioner alone. Moreover, even had Checker been made a party notwithstanding the agreement, had the agreement been disclosed to court, jury and counsel and subjected to comment by counsel and perhaps instructions by the court, no one can now say what difference as to liability or amount would have resulted.

We reiterate, we believe this Court, in the exercise of its supervisory powers, should review this case to the end that it may be made clear to the members of the bar in districts where contribution between joint tort feasors is not permitted that agreements between apparent adversaries looking to a secret advantage at the expense of a co-party will not be tolerated or counte-

nanced. We further respectfully submit that in the instant case an injustice has been worked upon petitioner by the agreement alleged and that an opportunity to present proofs in an attempt to correct that injustice in good conscience should be provided.

## CONCLUSION.

We respectfully submit that a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered November 19, 1956, and that upon such review a judgment similar to the amended judgment of the court in *Klapprott* v. *United States,* 336 U.S. 942, should be entered, reversing the judgment of the Court of Appeals and the order of the United States District Court for the Northern District of Illinois, Eastern Division, entered January 9, 1956 and directing the latter court to require an answer and proceed to receive proof of the allegations contained in petitioner's petition to vacate the judgment in this cause.

Respectfully submitted,

B. S. Quigley
Donald John Tufts
L. H. Vogel
Robert B. Johnstone
*Attorneys for Petitioner*

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Monday, November 19, 1956

BEFORE

Hon. WALTER C. LINDLEY, *Circuit Judge*
Hon. H. NATHAN SWAIM, *Circuit Judge*
Hon. FRED L. WHAM, *District Judge*

AUGUSTE PARKER,
*Plaintiff-Appellee,*

No. 11691 vs.

FIELD ENTERPRISES, INC.,
*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the ..... District of ....., ..... Division, and Motion of Plaintiff-Appellee that this Court assess damages against Defendant-Appellant and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court entered on January 9, 1956 denying the Petition of Defendant Field Enterprises, Inc., to open, vacate and set aside the judgment entered on December 5, 1955 and for a new trial, be, and the same is hereby, AFFIRMED, with costs.

It is further ordered and adjudged by this Court that the Motion of Plaintiff-Appellee Auguste Parker that this Court assess damages against Defendant-Appellant Field Enterprises, Inc., under Rule 26 of the Rules of this Court, be, and the same is hereby, DENIED.

In The

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. 11691 — SEPTEMBER TERM AND SESSION, 1956

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AUGUSTE PARKER,
*Plaintiff-Appellee,*
v.
CHECKER TAXI COMPANY, INC., a Corporation,
*Defendant-Appellee,*
and
FIELD ENTERPRISES, INC., a Corporation,
*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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November 19, 1956

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Before LINDLEY and SWAIM, *Circuit Judges,* and WHAM, *District Judge.*

WHAM, *District Judge.* This appeal arises out of an action filed by plaintiff-appellee, Auguste Parker, hereinafter called "Parker", against defendant-appellee, Checker Taxi Company, Inc., hereinafter called "Checker", and defendant-appellant Field Enterprises, Inc., hereinafter called "Field", seeking damages for bodily injuries sustained while riding as a fare-paying passenger in a taxicab owned and operated by Checker in a collision between said taxicab and motor vehicle owned and operated by

Field. The complaint charged each defendant with negligence in the operation of its vehicle proximately causing said collision and resulting injuries. Each defendant filed an answer denying fault or negligence and a cross or counterclaim seeking damages from its co-defendant for injuries done to its vehicle in the collision.

The case was tried to a jury. The verdict found both defendants liable to plaintiff for damages in the amount of $10,000; also found each defendant not liable to the other for damage to its vehicle. Judgment was entered on the verdict on October 10, 1955. Motions for a new trial by Field and for judgment notwithstanding the verdict by Checker were duly filed and, after hearing, denied on December 5, 1955. On January 4, 1956 Field filed a petition signed by its attorneys and verified by one of them on information and belief only, requesting the trial court on the basis of the allegations in the petition to vacate and set aside the verdict and the judgment against Field and to grant Field a new trial. This petition, after arguments heard, was denied by the trial court on the 9th day of January, 1956. On January 10, 1956 Field filed its notice of appeal. The appeal was (1) from the final judgment entered on October 10, 1955, (2) from the order entered on December 5, 1955 denying defendant Field's motion for new trial, and (3) from the order entered on January 9, 1956 denying defendant Field's petition to open, vacate and set aside the judgment entered on December 5, 1955 and for a new trial.

On motion of Parker duly supported by excerpts from the record, this court on April 24, 1956 entered an order herein as follows:

> "It is ordered and adjudged by this Court that such portions of this appeal of Field Enterprises, Inc., as are predicated upon (1) the Appeal from the Final Judgment entered in this cause on October 10, 1955 and

(2) the appeal from the Order entered on December 5, 1955 denying Motion of Defendant-Appellant for a new trial, be and the same is hereby DISMISSED with costs, because not timely taken. (Rule 73(a); F.R.C.P.)

Thus, the appeal now before this court is based solely on the denial by the trial court of the relief sought in the petition filed by Field with the trial court on January 4, 1956.

The substance of said petition was that about the time the original complaint was filed Parker entered into an agreement with Checker whereby Parker would name Checker a party defendant but would not execute any judgment against Checker if obtained; that in return for this agreement Checker promised to make its file available to Parker; that the agreement was in effect at the time of trial; that its existence had not been disclosed and was not then known to the court, to the jury, or to Field; that the effect of said unknown agreement was to place before the court and jury a moot question and to deny Field a fair and impartial trial in that the only question actually placed before court and jury was the liability of Field; that during the trial Checker did permit Parker to have use of its file in the prosecution of the suit and permitted its employee to be called on behalf of Parker as an adverse witness under "Section 60 of the Illinois Civil Practice Act". (The trial being in the federal court we assume the petitioner meant to cite Rule 43(b), Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, instead of Section 60 of the Illinois Civil Practice Act.) The petition further stated that Field knew nothing of the secret agreement until after the denial of Field's motion for a new trial on December 5, 1955; that the agreement was revealed to Field later

and a demand was made upon Field by Parker to pay the full amount of the judgment. The petition was signed by Field's attorneys and verified by one of them. The verification read: "That the things and matters set out in this Petition are true according to his information and belief."

It is the contention of Field that the agreement as set out in the petition, kept secret from court, jury and Field, operated as a fraud upon the court, the jury and Field to the prejudice of Field so as to give the trial court the right and to impose upon it as a duty in the exercise of a sound judicial discretion to vacate and set aside the judgment entered in favor of Parker against Field and to grant a new trial. This contention Parker disputes.

Neither party to this appeal questions the inherent right and power of the court in exercise of a sound judicial discretion to vacate a judgment obtained through fraud or connivance and thereupon to grant a new trial. Nor is it denied that the court's failure under proper facts and circumstances adequately proved to vacate the judgment under attack for fraud and to grant a new trial would constitute such abuse of its discretion as to be reversible error. The court's discretion is not an arbitrary one to be capriciously exercised but a sound, legal discretion guided by accepted legal principles. *Assman* v. *Fleming*, 8 Cir., 159 F. 2d 332; *Illinois Printing Co.* v. *Electric Shovel Coal Corporation*, 20 F. Supp. 181; *Jones* v. *Jones*, 7 Cir., 217 F. 2d 239; *Independence Lead Mines Company* v. *Kingsbury*, 9 Cir., 175 F. 2d 983; *Hines* v. *Muirheid*, 346 Ill. App. 302, 104 N.E. 2d 838.

The inherent right of the court to vacate a judgment for fraud, as stated above, is strengthened by Rule 60(b), Federal Rules of Civil Procedure, 28 U.S.C.A. following

Section 723c, which provides that on motion the court may relieve a party from a final judgment or order for fraud, misrepresentation, or other misconduct of an adverse party.

Referring to the foregoing rule in its opinion in *Jones* v. *Jones, supra,* this court said, at page 241:

> "Numerous cases support the view that a motion to vacate a judgment under Rule 60(b) is addressed to the sound legal discretion of the court and that its determination will not be disturbed upon appeal except for an abuse of discretion." (Citing authorities.)

The burden of proving fraud or connivance in the procurement of a judgment justifying relief under the rule is on the applicant for an order vacating the judgment and granting a new trial. *Assman* v. *Fleming, supra.*

Applying here the foregoing principles, did the trial court exercise a sound judicial discretion when, after hearing counsel for the parties relating to the petition filed on January 4, 1956, it entered an order denying the petition? The burden of proof being upon the appellant to show fraud or connivance in the procurement of the judgment in question which would justify the relief sought, was the petition in and of itself sufficient to meet this burden?

The court had nothing before it except the record in the case and the bare petition made on behalf of Field by its attorneys and verified by one of them on information and belief. The record fails to show any additional proof offered by Field prior to or at the time of the hearing.

As we look at the contents of the petition in the light of the verdict of the jury whereby both Checker and Field were found guilty and liable alike, we see nothing

other than the conclusions of the affiants that could justify a finding by the court that the alleged agreement between Parker and Checker in any way influenced or affected the outcome of the case. Nothing appears in the petition except the conclusions of the affiants that warranted a finding by the court that Field was prejudiced in the trial by the alleged agreement or that the evidence would have been different in its absence. The conclusions of affiants were not evidence. The case presented by the petition was peculiarly within the discretion of the trial court. In *Independence Lead Mines Company* v. *Kingsbury, supra,* at page 988, the court used language that is applicable here when it said:

> "It must be remembered that a petition to vacate a judgment is addressed to the sound legal discretion of the trial court, and its determination will not be disturbed except for abuse of discretion. (Citing authorities.) Particularly is this true in this instance, where the experienced judge passing on the petition had presided in the litigation in which the judgment was entered, and it is claimed that fraud was practiced upon the court. Certainly we are not able to say that the court's ruling adverse to the petition was wrong."

We cannot say from the record before us here that the district court did not exercise a sound legal discretion when it denied appellant's petition.

The order of the district court is affirmed.

On July 20, 1956, during the pendency of this appeal Parker filed herein a motion for assessment of damages against Field in the sum of $1,000.00 under the provisions of Rule 26 of this court on the ground that Field's appeal had been sued out merely for delay, with a request that the motion be considered with Field's appeal. Rule 26 provides that "In all cases where an appeal delays proceedings on the judgment of the lower court and the court

finds that the appeal has been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, may be awarded upon the amount of money judgment * * *." Upon such consideration we are unable to say that Field's appeal was frivolous or taken merely for delay. The appeal was taken immediately after the order appealed from was entered and the prosecution of the appeal has been zealous and in apparent good faith. The briefs and arguments, written and oral, on behalf of appellant were well prepared and earnestly presented. A supersedeas bond in adequate amount, conditioned to pay the entire judgment with accrued interest and costs in the event appellant failed to prosecute the appeal faithfully and successfully was filed by appellant. After consideration we are not convinced that the appeal was sued out merely for delay.

The motion for damages under Rule 26 is denied.

A true Copy:

Teste:

Seal

Kenneth J. Carrick (sgd)
*Clerk of the United States Court of Appeals for the Seventh Circuit.*

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, December 26, 1956

BEFORE

Hon. WALTER C. LINDLEY, *Circuit Judge*
Hon. H. NATHAN SWAIM, *Circuit Judge*
Hon. FRED L. WHAM, *District Judge*

AUGUSTE PARKER,
*Plaintiff-Appellee,*

No. 11691 vs.

FIELD ENTERPRISES, INC.,
*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

The alternative motion of defendant-appellant for leave to file instanter an amendment to the petition filed January 4, 1956 in cause 54-C-1741 is denied. The petition for rehearing is denied.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

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I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of the Order, entered April 24, 1956, Printed Record, filed May 17, 1956, Opinion, filed November 19, 1956, Judgment, entered November 19, 1956 and Order denying Petition for Rehearing, entered December 26, 1956, in

Cause No. 11691

AUGUSTE PARKER, *Plaintiff-Appellee,*

vs.

FIELD ENTERPRISES, INC., *Defendant-Appellant.*

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States
(Seal) Court of Appeals for the Seventh Circuit, at the City of Chicago, this fourth day of January A. D. 1957.

*Kenneth J. Carrick*
Clerk of the United States Court of Appeals for the Seventh Circuit.